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U.S. Environmental Protection Agency
EPA West (Air Docket)
1200 Pennsylvania Avenue, NW
Room B108, Mail Code: 6102T
Washington, DC 20460

Attention: E-Docket No. OAR-2004-0094

Re: Comments on EPA's Proposed Amendments to the General Provisions for Clean Air Act Section 112; 70 *Fed. Reg.* 43992 (July 29, 2005)

Dear Docket Officer:

On behalf of the American Forest & Paper Association, Alliance of Automobile Manufacturers, American Petroleum Institute, National Petrochemical and Refiners Association, and the Air Permitting Forum attached are comments on EPA's Proposed Amendments to the General Provisions for Clean Air Act Section 112.

Please contact Shannon Broome (510) 985-1710 (sbroome@pacbell.net) or Chuck Knauss (202) 424-7644 (chknauss@swidlaw.com) with any questions.

Sincerely,

/s/

Shannon S. Broome

Enclosure

Comments of the American Forest & Paper Association, Alliance of Automobile Manufacturers, American Petroleum Institute, National Petrochemical and Refiners Association, and the Air Permitting Forum on EPA's Proposed Amendments to the General Provisions for Clean Air Act Section 112

70 *Fed. Reg.* 43992 (July 29, 2005)

Docket No. OAR-2004-0094
Submitted September 12, 2005

The American Forest & Paper Association, Alliance of Automobile Manufacturers, American Petroleum Institute, National Petrochemical and Refiners Association, and the Air Permitting Forum (collectively, the "Associations") submit the following comments on EPA's proposed revisions to the General Provisions for Clean Air Act Section 112. The Associations are generally supportive of EPA's proposed changes to the rules. Our comments explain why we believe EPA's revised regulatory focus on the general duty to minimize emissions during startups, shutdowns, and malfunctions (SSM) is more environmentally protective, more workable, and more consistent with the overall regulatory construct of Section 112 standards than the current focus on the individual elements of the SSM plan. We also provide below some conforming changes for both the General Provisions and particular National Emissions Standards for Hazardous Air Pollutants (NESHAPs) that were apparently overlooked in drafting this proposal and we request that these be included in the final rule.

Following This Revision It is Important for the General Provisions to Remain Stable for a Reasonable Period of Time.

This proposal arises out of a Petition for Reconsideration by the Natural Resources Defense Council (NRDC) regarding a final rule issued in May 2003. Before going into the specifics of the proposed rule, it is important to recognize that the May 2003 rule and this proposal have a long history. Indeed, over the past 11 years, the General Provisions have been the subject of litigation and numerous draft revisions, proposals, and final revisions. While a few of the changes have been controversial, the vast majority were related to ensuring that cross-references in the rules were accurate, correcting minor errors in the original drafting, updating provisions in light of subsequently issued emissions standards, clarifying definitions (like whether a malfunction occurs if the source knows that no excess emissions occurred), and the like. During this process, EPA has significantly improved the clarity of the regulations. In fact, one of the most significant improvements made by EPA in its implementation of the Section 112 program was to include a table in each emissions standard indicating precisely which of the General Provisions apply to that standard.

As states near the end of their processes to issue initial Title V permits, it is helpful to minimize regulatory changes that may necessitate a permit revision. We are hopeful that the final rule resulting from this proposal will mark finality and certainty for the General Provisions for some period of time.

The Associations Support the Revised Focus on the Process of Developing a Plan Rather Than on the Plan Elements as Applicable Requirements.

The focus of this proposal is on the startup, shutdown and malfunction provisions of the regulations. The proposed rule makes modest, but important, changes to the requirements for managing SSM events at regulated facilities, returning to the core requirement that sources

minimize to the extent practicable excess emissions during SSM events. Because a malfunction of a control device may mean that it is not possible to comply during an event, the general duty ensures that sources will manage their activities responsibly. The proposed rule would preserve the core element of the rule, the general duty, and also mandate that sources develop SSM plans. EPA has appropriately determined that it is the *process* of analyzing what might happen during an SSM event and potential ways in which to respond to such situations that protects the environment.

We agree that there should be a requirement to engage in a planning process for malfunctions and startup and shutdown events. As various members of this group have previously commented, however, it is unreasonable to impose the elements of the plan as "applicable requirements." First, making "compliance" with a set course of action for a malfunction, especially one that escalates into an emergency situation elevates the ministerial over substance. It is important that facilities have the flexibility to take the most appropriate steps to respond to a situation as it occurs. As events unfold, approaches in the SSM plan (while useful from a planning standpoint) may or may not be the most effective or the safest ways to bring a malfunction under control and return to normal operation. Still, the facility, the public, and the environment are better protected by the fact that planning occurred. That is why the requirement to plan is important but the elements of that plan should not be enforceable requirements.

Second, as a practical matter, the regulations as originally drafted seemed to contemplate an SSM plan that was located in one place at the facility. Over the years, EPA has come to realize that facilities incorporate their procedures for responding to SSM events in their operating procedures. There is no one set "plan" but a series of steps and procedures that are activated based on the nature of the situation. The Agency's previous approach could create problems by driving development of separate SSM documents (especially in light of the public disclosure requirement). The prior approach did not promote the more effective practice of integrating compliance with day-to-day operational activities. The approach in this proposal, which places primary importance on minimizing emissions and duration of an event, makes compliance with the rule intuitive and consistent with the natural inclination of operators to return to a normal mode of operation.[1]

Third, this approach relieves the unreasonable burden that potentially existed under the prior rule in which requests for an SSM plan from the public could spur numerous hours of administrative work to collate a plan that is dispersed throughout the facility (and may exist largely in electronic programming) translate it and make it publicly available. Additionally, the ability of the public to pore over SSM planning documents creates the potential for broad public dissemination of plant security details.

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[1] Those who claim that the general duty cannot be separate from the requirement to have and comply with an SSM plan have missed the point. The point is to ensure the source has a plan to minimize emissions when these events occur; it is not to make sources beholden to procedures that may not be appropriate in a given situation. For example, if a facility could resolve a malfunction event more quickly than it would if it followed its plan, a requirement to follow the plan precisely would actually lead to increased emissions. In our experience, the best solution to a problem is often found as the particular situation develops. In the throes of a serious storm or an equipment upset, operators will follow operating procedures, but may need to deviate from those procedures to solve problems on the ground as they occur. We note that the Indiana Department of Environmental Management (IDEM) has taken a similar approach in its Title V permit program. Indiana Title V permits require that for certain units, a facility develop a compliance response plan when a monitored parameter goes out of the expected range. The permits require the process of planning, but do not require compliance with the plan. Instead, these permits require that the source take reasonable response steps and specifically provide that failure to follow the plan is not a violation of the permit provided the source took reasonable steps to respond to the situation as it occurs. EPA's approach here strikes a reasonable balance among requiring, planning and ensuring the flexibility to take appropriate steps to minimize emissions.

The Agency Should Clarify the Relationship of the SSM Plan Requirement to Title V.

Both the current rule and the proposal include language stating that the Title V permit must require the source to develop the SSM plan (with the current rule also requiring "implementation" of the plan). Section 63.6(e)(3)(ix). We agree that under the revised (and the current) language, sources have an obligation to develop a plan and this should be reflected in the Title V permit. The form in which the requirement is included in the permit is unclear under this requirement. EPA does not specify that a Title V permit term must be included for other General Provision mandates, so one might read this to imply that a separate citation or repetition of this requirement is needed. This differs from the typical approach in Title V permits, which is to reference the applicable General Provisions listed in the table issued with each individual NESHAP.

Of course, the requirement to develop an SSM plan exists under Section 112 regardless of whether it is separately referenced from other General Provisions, just like all other applicable sections of the General Provisions. Referencing it separately does not make it any more or less enforceable than a more inclusive reference. In our view, there is no basis for distinguishing the requirement to develop the SSM plan from the numerous other requirements under Subpart A. Typically, Title V permits will reference sections of a subpart or, for the General Provisions, the applicability table that is included in each NESHAP. Including a separate term in the Title V permit specifically for SSM plans does nothing to increase the enforceability of the requirement. It applies whether it is referenced directly, repeated verbatim, referenced through the General Provisions applicability table or otherwise.

At the same time, we recognize that the primary purpose of Section 63.6(e)(3)(ix) is to clarify that changes to SSM plans do not trigger permit revision requirements. We have therefore suggested a revision to this section, which would state that the SSM requirement could be cross-referenced/incorporated using a citation-based approach, consistent with other MACT standards. See the Attachment for suggested regulatory language.

In addition, although EPA states in the preamble that the elements of the SSM plan are not applicable requirements, we believe it is important for the regulatory language to explicitly include such a statement. We have included suggested language in the Attachment under Section 63.6(e)(3)(ix).

The Associations Support the Clarifying Technical Revision to the Reporting Requirements for Startups and Shutdowns and Request that EPA Make Additional Conforming Changes.

The May 2003 final rule attempted to clarify some confusion regarding which events need to be reported and when. As originally drafted, the regulations spoke to SSM events without regard to the emission impact, but the preambles to the original and/or subsequent proposals and final rules focused on events that caused emission exceedances. As a practical matter, state permitting authorities often request that sources only report on events that actually exceed applicable emission limitations. EPA clarified the malfunction definition in the May 2003 final rule so that it only includes events that caused an exceedance or for which the source does not know if an exceedance occurred.

While the Agency recognized that some sources start up and shut down frequently and that often no excess emissions occur (*e.g.,* if the source waits until incinerator temperature meets a minimum value before initiating a coating operation), 68 *Fed. Reg.* 32592, EPA did not make similar clarifications for startups and shutdowns. Moreover, the reporting provisions still referenced "malfunctions" where no emissions exceedance had occurred, notwithstanding that the revised definition excludes from the malfunction definition events that did not exceed emission levels. 40 CFR § 63.10(d)(5)(i).

This proposal attempts to resolve the conflicts created in the May 2003 final rule regarding reporting requirements for SSM events. Specifically, it clarifies that recordkeeping and reporting only apply when a startup or shutdown has caused the source to exceed an applicable limit. During our review of the proposed revisions, we discovered a few subsections of the rule where these conforming changes were apparently overlooked by the Agency. The attachment to these comments shows the additional conforming changes that we believe are necessary. In addition, there are several subparts for which additional conforming changes are needed to clarify the scope of the malfunction definition (consistent with the May 2003 rule changes) as well as to eliminate language that may be read to indicate that compliance with the startup, shutdown and malfunction plan is required. Again, the Attachment indicates the additional changes we believe are necessary.

* * * * * * *

In conclusion, the Associations believe EPA's focus on the general duty will preserve and enhance facility programs to minimize emissions during startups, shutdowns and malfunctions while also reducing some of the paperwork burdens associated with the prior rule. We urge the Agency to act quickly to adopt a final rule, with the conforming changes recommended in these comments and the attachment.

Attachment

EPA PROPOSED CHANGES TO STARTUP, SHUTDOWN, AND MALFUNCTION PROVISIONS

and

ADDITIONAL CONFORMING CHANGES SUGGESTED BY THE ASSOCIATIONS

Key			
Red	single underline/single strikeout	=	Proposed Changes by EPA
Blue	double underline/double strikeout	=	Additional Conforming Changes Suggested by the Associations

§ 63.6 Compliance with standards and maintenance requirements.

(e) *Operation and maintenance requirements.* (1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. During a period of startup, shutdown, or malfunction, this general duty to minimize emissions requires that the owner or operator reduce emissions from the affected source to the greatest extent which is consistent with safety and good air pollution control practices. The general duty to minimize emissions during a period of startup, shutdown, or malfunction does not require the owner or operator to achieve emission levels that would be required by the applicable standard at other times if this is not consistent with safety and good air pollution control practices, nor does it require the owner or operator to make any further efforts to reduce emissions if levels required by the applicable standard have been achieved. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

(ii) Malfunctions must be corrected as soon as practicable after their occurrence ~~**in accordance with the startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section**~~. To the extent that an unexpected event arises during a startup, shutdown, or malfunction, an owner or operator must comply by minimizing emissions during such a startup, shutdown, and malfunction event consistent with safety and good air pollution control practices. **[NOTE: The last sentence of this provision is already addressed in subparagraph (i). Ideally, this sentence would be deleted. At least one standard (Subpart F, the Hazardous Organic NESHAP) does not incorporate subparagraph (i) and thus the statement of the general duty in subparagraph (ii) becomes necessary for that standard. Thus, to delete the general duty sentence from subparagraph (ii), conforming changes to other subparts may be needed. EPA should review the other standards to determine which require changes and if all of those can be made, this sentence can be deleted.]**

(iii) Operation and maintenance requirements established pursuant to section 112 of the Act are enforceable independent of emissions limitations or other requirements in relevant standards.

(2) [Reserved]

(3) *Startup, shutdown, and malfunction plan.* (i) The owner or operator of an affected source must develop ~~and implement~~ a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for malfunctioning process~~,~~ and air pollution control, and monitoring equipment used to comply with the relevant standard. This plan must be developed by the owner or operator by the source's compliance date for that relevant standard. The purpose of the startup, shutdown, and malfunction plan is to—

(A) Ensure that, at all times, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty to minimize emissions established by paragraph (e)(1)(i) of this section;

(B) Ensure that owners or operators are prepared to correct malfunctions as soon as practicable after their occurrence in order to minimize excess emissions of hazardous air pollutants; and

(C) Reduce the reporting burden associated with periods of startup, shutdown, and malfunction (including corrective action taken to restore malfunctioning process and air pollution control equipment to its normal or usual manner of operation).

The startup, shutdown, and malfunction plan does not need to address any scenario that would not cause the source to exceed an applicable emission limitation in the relevant standard.

~~**(ii) During periods of startup, shutdown, and malfunction, the owner or operator of an affected source must operate and maintain such source (including associated air pollution control and monitoring equipment) in accordance with the procedures specified in the startup, shutdown, and malfunction plan developed under paragraph (e)(3)(i) of this section.** **[Reserved.]**~~

(iii) When actions taken by the owner or operator during a startup **or** ~~,~~ shutdown **(and the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards),** or malfunction (including actions taken to correct a malfunction) are consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, the owner or operator must keep records for that event which demonstrate that the procedures specified in the plan were followed. These records may take the form of a "checklist," or other effective form of recordkeeping that confirms conformance with the startup, shutdown, and malfunction plan for that event. In addition, the owner or operator must keep records of these events as specified in §63.10(b), including records of the occurrence and duration of each startup~~,~~ **or** shutdown **(if the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards),** or malfunction of operation and each malfunction of the air pollution control and monitoring equipment. Furthermore, the owner or operator shall confirm that actions taken during the relevant reporting period during periods of startup, shutdown, and malfunction were consistent with the affected source's startup, shutdown and malfunction plan in the semiannual (or more frequent) startup, shutdown, and malfunction report required in §63.10(d)(5).

(iv) If an action taken by the owner or operator during a startup, shutdown, or malfunction (including an action taken to correct a malfunction) is not consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, and the source exceeds any applicable emission limitation in the relevant emission standard, then the owner or operator must record the actions taken for that event and must report such actions within 2 working days after commencing actions inconsistent with the plan, followed by a letter within 7 working days after the

end of the event, in accordance with §63.10(d)(5) (unless the owner or operator makes alternative reporting arrangements, in advance, with the Administrator).

(v) The owner or operator must maintain at the affected source a current startup, shutdown, and malfunction plan and must make the plan available upon request for inspection and copying by the Administrator. In addition, if the startup, shutdown, and malfunction plan is subsequently revised as provided in paragraph (e)(3)(viii) of this section, the owner or operator must maintain at the affected source each previous (i.e., superseded) version of the startup, shutdown, and malfunction plan, and must make each such previous version available for inspection and copying by the Administrator for a period of 5 years after revision of the plan. If at any time after adoption of a startup, shutdown, and malfunction plan the affected source ceases operation or is otherwise no longer subject to the provisions of this part, the owner or operator must retain a copy of the most recent plan for 5 years from the date the source ceases operation or is no longer subject to this part and must make the plan available upon request for inspection and copying by the Administrator. The Administrator may at any time request in writing that the owner or operator submit a copy of any startup, shutdown, and malfunction plan (or a portion thereof) which is maintained at the affected source or in the possession of the owner or operator. Upon receipt of such a request, the owner or operator must promptly submit a copy of the requested plan (or a portion thereof) to the Administrator. ~~**The Administrator must request that the owner or operator submit a particular startup, shutdown, or malfunction plan (or a portion thereof) whenever a member of the public submits a specific and reasonable request to examine or to receive a copy of that plan or portion of a plan.**~~ The owner or operator may elect to submit the required copy of any startup, shutdown, and malfunction plan to the Administrator in an electronic format. If the owner or operator claims that any portion of such a startup, shutdown, and malfunction plan is confidential business information entitled to protection from disclosure under section 114(c) of the Act or 40 CFR 2.301, the material which is claimed as confidential must be clearly designated in the submission.

(vi) To satisfy the requirements of this section to develop a startup, shutdown, and malfunction plan, the owner or operator may use the affected source's standard operating procedures (SOP) manual, or an Occupational Safety and Health Administration (OSHA) or other plan, provided the alternative plans meet all the requirements of this section and are made available for inspection or submitted when requested by the Administrator.

(vii) Based on the results of a determination made under paragraph (e)(1)(i) of this section, the Administrator may require that an owner or operator of an affected source make changes to the startup, shutdown, and malfunction plan for that source. The Administrator must require appropriate revisions to a startup, shutdown, and malfunction plan, if the Administrator finds that the plan:

(A) Does not address a startup, shutdown, or malfunction event that has occurred;

(B) Fails to provide for the operation of the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with the general duty to minimize emissions established by paragraph (e)(1)(i) of this section;

(C) Does not provide adequate procedures for correcting malfunctioning process and/or air pollution control and monitoring equipment as quickly as practicable; or

(D) Includes an event that does not meet the definition of startup, shutdown, or malfunction listed in §63.2.

(viii) The owner or operator may periodically revise the startup, shutdown, and malfunction plan for the affected source as necessary to satisfy the requirements of this part or to reflect changes

in equipment or procedures at the affected source. Unless the permitting authority provides otherwise, the owner or operator may make such revisions to the startup, shutdown, and malfunction plan without prior approval by the Administrator or the permitting authority. However, each such revision to a startup, shutdown, and malfunction plan must be reported in the semiannual report required by §63.10(d)(5). If the startup, shutdown, and malfunction plan fails to address or inadequately addresses an event that meets the characteristics of a malfunction but was not included in the startup, shutdown, and malfunction plan at the time the owner or operator developed the plan, the owner or operator must revise the startup, shutdown, and malfunction plan within 45 days after the event to include detailed procedures for operating and maintaining the source during similar malfunction events and a program of corrective action for similar malfunctions of process or air pollution control and monitoring equipment. In the event that the owner or operator makes any revision to the startup, shutdown, and malfunction plan which alters the scope of the activities at the source which are deemed to be a startup, shutdown, or malfunction, or otherwise modifies the applicability of any emission limit, work practice requirement, or other requirement in a standard established under this part, the revised plan shall not take effect until after the owner or operator has provided a written notice describing the revision to the permitting authority.

(ix) The title V permit for an affected source must require that the owner or operator **~~adopt~~** **develop** a startup, shutdown, and malfunction plan which conforms to the provisions of this part, **but may do so by citing to the relevant subpart or subparagraphs of Section 63.6(e)~~, and that the owner or operator operate and maintain the source in accordance with the procedures specified in the current startup, shutdown, and malfunction plan~~.** However, any revisions made to the startup, shutdown, and malfunction plan in accordance with the procedures established by this part shall not be deemed to constitute permit revisions under part 70 or part 71 of this chapter **and the elements of the startup, shutdown, and malfunction plan shall not be considered an applicable requirement as defined in §70.2 and §71.2**. Moreover, none of the procedures specified by the startup, shutdown, and malfunction plan for an affected source shall be deemed to fall within the permit shield provision in section 504(f) of the Act.

§ 63.8 Monitoring requirements.

(c) *Operation and maintenance of continuous monitoring systems.* (1) The owner or operator of an affected source shall maintain and operate each CMS as specified in this section, or in a relevant standard, and in a manner consistent with good air pollution control practices. (i) The owner or operator of an affected source must maintain and operate each CMS as specified in §63.6(e)(1).

(ii) The owner or operator must keep the necessary parts for routine repairs of the affected CMS equipment readily available.

(iii) The owner or operator of an affected source must develop **~~and implement~~** a written startup, shutdown, and malfunction plan for CMS as specified in §63.6(e)(3).

§ 63.10 Recordkeeping and reporting requirements.

(b) *General recordkeeping requirements.* (1) The owner or operator of an affected source subject to the provisions of this part shall maintain files of all information (including all reports and notifications) required by this part recorded in a form suitable and readily available for expeditious inspection and review. The files shall be retained for at least 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record. At a minimum, the most recent 2 years of data shall be retained on site. The remaining 3 years of data may be retained off site. Such files may be maintained on microfilm, on a computer, on computer floppy disks, on magnetic tape disks, or on microfiche.

(2) The owner or operator of an affected source subject to the provisions of this part shall maintain relevant records for such source of—

(i) The occurrence and duration of each startup or~~,~~ shutdown **when the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards~~, or malfunction of operation (i.e., process equipment);~~**

(ii) The occurrence and duration of each malfunction of **operation (*i.e.*, process equipment) or** the required air pollution control and monitoring equipment;

(iii) All required maintenance performed on the air pollution control and monitoring equipment;

(iv) Actions taken during periods of startup **or ~~,~~** shutdown **(for which the source exceeded applicable emission limitations in a relevant standard)**, **or ~~and~~** malfunction (including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation) when such actions are different from the procedures specified in the affected source's startup, shutdown, and malfunction plan (see §63.6(e)(3));

(v) All information necessary to demonstrate conformance with the affected source's startup, shutdown, and malfunction plan (see §63.6(e)(3)) when all actions taken during periods of startup **or ~~,~~** shutdown **(and the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards)**, and malfunction (including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation) are consistent with the procedures specified in such plan. (The information needed to demonstrate conformance with the startup, shutdown, and malfunction plan may be recorded using a "checklist," or some other effective form of recordkeeping, in order to minimize the recordkeeping burden for conforming events);
…

(d) *General reporting requirements.*

(5)(i) *Periodic startup, shutdown, and malfunction reports.* If actions taken by an owner or operator during a startup **or ~~,~~** shutdown **(and the startup or shutdown causes the source to exceed any applicable emission limitation in the relevant emission standards)**, or malfunction of an affected source (including actions taken to correct a malfunction) are consistent with the procedures specified in the source's startup, shutdown, and malfunction plan (see §63.6(e)(3)), the owner or operator shall state such information in a startup, shutdown, and malfunction report. **~~Such a report shall identify any instance where any action taken by an owner or operator during a startup, shutdown, or malfunction (including actions taken to correct a malfunction) is not consistent with the affected source's startup, shutdown, and malfunction plan, but the source does not exceed any applicable emission limitation in the relevant emission standard.~~** Such a report shall also include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. Reports shall only be required if a startup **or ~~,~~** shutdown **caused the source to exceed any applicable emission limitation in the relevant emission standards**, or **if a** malfunction occurred during the reporting period. The startup, shutdown, and malfunction report shall consist of a letter, containing the name, title, and signature of the owner or operator or other responsible official who is certifying its accuracy, that shall be submitted to the Administrator semiannually (or on a more frequent basis if specified otherwise in a relevant standard or as established otherwise by the permitting authority in the source's title V permit). The startup, shutdown, and malfunction report shall be delivered or postmarked by the 30th day following the end of each calendar half (or other calendar reporting period, as appropriate). If the owner or operator is required to submit excess

emissions and continuous monitoring system performance (or other periodic) reports under this part, the startup, shutdown, and malfunction reports required under this paragraph may be submitted simultaneously with the excess emissions and continuous monitoring system performance (or other) reports. If startup, shutdown, and malfunction reports are submitted with excess emissions and continuous monitoring system performance (or other periodic) reports, and the owner or operator receives approval to reduce the frequency of reporting for the latter under paragraph (e) of this section, the frequency of reporting for the startup, shutdown, and malfunction reports also may be reduced if the Administrator does not object to the intended change. The procedures to implement the allowance in the preceding sentence shall be the same as the procedures specified in paragraph (e)(3) of this section.

(ii) *Immediate startup, shutdown, and malfunction reports.* Notwithstanding the allowance to reduce the frequency of reporting for periodic startup, shutdown, and malfunction reports under paragraph (d)(5)(i) of this section, any time an action taken by an owner or operator during a startup **or** ~~,~~ shutdown **that caused the source to exceed any applicable emission limitation in the relevant emission standards**, or malfunction (including actions taken to correct a malfunction) is not consistent with the procedures specified in the affected source's startup, shutdown, and malfunction plan, ~~**and the source exceeds any applicable emission limitation in the relevant emission standard,**~~ the owner or operator shall report the actions taken for that event within 2 working days after commencing actions inconsistent with the plan followed by a letter within 7 working days after the end of the event. The immediate report required under this paragraph (d)(5)(ii) shall consist of a telephone call (or facsimile (FAX) transmission) to the Administrator within 2 working days after commencing actions inconsistent with the plan, and it shall be followed by a letter, delivered or postmarked within 7 working days after the end of the event, that contains the name, title, and signature of the owner or operator or other responsible official who is certifying its accuracy, explaining the circumstances of the event, the reasons for not following the startup, shutdown, and malfunction plan, and describing all excess emissions and/or parameter monitoring exceedances which are believed to have occurred. Notwithstanding the requirements of the previous sentence, after the effective date of an approved permit program in the State in which an affected source is located, the owner or operator may make alternative reporting arrangements, in advance, with the permitting authority in that State. Procedures governing the arrangement of alternative reporting requirements under this paragraph (d)(5)(ii) are specified in §63.9(i).

Below are suggested changes for specific Subparts to provide consistency with proposed changes to the Subpart A General Provisions and that the proposed changes do not inadvertently supersede SSM requirements in the individual Subparts:

1. Several of the proposed Subpart revisions need clarification to ensure that only the relevant provisions of §63.6(e) or equivalent must be met.

   A. Subpart G

   Several of the proposed amendments provide conforming changes to the MACT Subparts to ensure consistency with changes to the General Provisions. For example, the following revision is proposed by EPA.

   > §63.152(c)(2)(ii)(C)(1) Periods of start-up, shutdown, or malfunction. During periods of startup, shutdown, or malfunction when the source is operated during such periods in accordance with ***§63.6(e)*** ~~***the source's startup, shutdown, and malfunction plan as required by §63.6(e)(3) of subpart A***~~. [Emphasis added]
   >
   > and
   >
   > §63.152(g)(2)(iv)(A) The daily average value during any start-up, shutdown, or malfunction shall not be considered an excursion for purposes of this paragraph (g)(2), if the owner or operator ***follows the applicable provisions of the startup, shutdown,***

~~and malfunction plan required by §63.6(e)(3) of subpart A of this part operates the source during such periods in accordance with §63.6(e)~~. [Emphasis added]

This new wording could be construed to impose a new requirement to comply with all the requirements of §63.6(e), rather than just those provisions in §63.6(e) that apply to the HON per Table 3 of subpart F. For example, the HON requires compliance with §63.102(a)(4) in place of §63.6(e)(1)(i) and §63.6(e)(3)(i)(A), §63.103(c) in place of §63.6(e)(3)(v), and §63.103(c)(2) and §63.152(d)(1) in place of §63.6(e)(3)(iii) and (iv).

To be clear that these HON requirements remain applicable and are not being changed by the proposed rule revisions, we recommend revising the proposed amendment language as follows:

> §63.152(c)(2)(ii)(C)(1) Periods of start-up, shutdown, or malfunction. During periods of startup, shutdown, or malfunction when the source is operated during such periods in accordance with **the applicable provisions of** § 63.6(e).
>
> and
>
> §63.152(g)(2)(iv)(A) The daily average value during any startup, shutdown, or malfunction shall not be considered an excursion for purposes of this paragraph (g)(2), if the owner or operator operates the source during such periods in accordance with **the applicable provisions of** § 63.6(e).

B. Subpart MM

In the proposed revisions to Subpart MM, EPA leaves the phrase "to be followed" in place. This phrase should be deleted to avoid creating the impression that the elements of the SSM plan are enforceable applicable requirements.

> § 63.866 Recordkeeping requirements.
>
> (a) * * * The owner or operator must develop a written plan as described in § 63.6(e)(3) that contains specific procedures ***~~to be followed~~*** for operating the source and maintaining the source during periods of startup, shutdown, and malfunction, and a program of corrective action for malfunctioning process and control systems used to comply with the standards. * * *
>
> * * * * *

C. Subpart SS

Similar revisions are recommended to subpart SS where, in some cases, none of §63.6(e)(3) may apply because the SSM provisions applicable to the referencing subpart are contained in §63.1111. As indicated in §63.980 of subpart SS, the provisions of part 63 subpart A only apply to subpart SS as specified in the referencing subpart. Thus, if §63.6(e)(3) does not apply to the referencing subpart it does not apply to subpart SS when subpart SS is used for compliance with that referencing subpart.

Thus, the following changes are recommended to the proposed amendments to subpart SS:

> §63.998(b)(2)(iii) Startups, shutdowns, and malfunctions, if the owner or operator operates the source during such periods in accordance with **the provisions of** §63.6(e)**, §63.1111(a), or the referencing subpart, as applicable**, and maintains the records specified in paragraph (d)(3) of this section.
>
> §63.998(b)(6)(i)(A) The daily average value during any startup, shutdown, or malfunction shall not be considered an excursion if the owner or operator operates the source during such periods in accordance with **the provisions of** §63.6(e)**, §63.1111(a), or the referencing subpart, as applicable,** and maintains the records specified in paragraph (d)(3) of this section.

§63.998(b)(6) (ii) * * * If a source has developed a startup, shutdown and malfunction plan, and a monitored parameter is outside its established range or monitoring data are not collected during periods of start-up, shutdown, or malfunction (and the source is operated during such periods in accordance with **the provisions of** §63.6(e)**, §63.1111(a), or the referencing subpart, as applicable,** or during periods of non-operation of the process unit or portion thereof (resulting in cessation of the emissions to which monitoring applies), then the excursion is not a violation and, in cases where continuous monitoring is required, the excursion does not count as the excused excursion for determining compliance.

2. Several conforming changes are required in Part 65 (Consolidated Air Rule, or CAR) to ensure consistency with proposed changes in the General Provisions.

   §65.2 (Consolidated Air Rule) Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, monitoring equipment, process equipment, or a process to operate in a normal or usual manner **which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded.** Failures that are caused in part by poor maintenance or careless operation are not malfunctions. Malfunctions that do not affect a regulated source or compliance with this part are not malfunctions for purposes of this part.

   §65.115(b) Compliance standard. (1) Owners or operators of closed vent systems and non-flare control devices used to comply with provisions of this subpart shall design and operate the closed vent systems and non-flare control devices to reduce emissions of regulated material with an efficiency of 95 percent or greater, or to reduce emissions of regulated material to a concentration of 20 parts per million by volume or, for an enclosed combustion device, to provide a minimum residence time of 0.50 second at a minimum of 760 °C (1400 °F). Owners and operators of closed vent systems and non-flare control devices used to comply with this part shall comply with the provisions of §65.142(d), except as provided in §65.102(b). **~~Note that this includes the startup, shutdown, and malfunction plan specified in §65.6.~~**

   (2) Owners or operators of closed vent systems and flares used to comply with the provisions of this subpart shall design and operate the flare as specified in §65.142(d), except as provided in §65.102(b). **~~Note that this includes the startup, shutdown, and malfunction plan specified in §65.6.~~**

   §65.161(e)(2)(iv)(A) The daily average value during any startup, shutdown, or malfunction shall not be considered an excursion for purposes of this paragraph (e) if the owner or operator follows the applicable provisions of §65.3(a) **~~the startup, shutdown, and malfunction plan required by §65.6~~**.

3. Conforming changes to the definition of malfunction are needed for consistency with the May 30, 2003 general provisions revisions.

   In this proposed rule, EPA proposes a conforming change to startup and shutdown recordkeeping requirements to make them consistent with the reporting change that was made to §63.10(d)(5)(i) on May 30, 2003. This change is discussed in the preamble on page 43994 of the proposal notice. A similar conforming change is needed relative to malfunction record and reports. Most part 63 rules use the general provision definition of malfunction, which was amended in the May 30 rulemaking to be as follows:

   > Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual *manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded.* Failures that are caused in part by poor maintenance or careless operation are not malfunctions. [Emphasis added to indicate May 30, 2003 addition.]

   EPA explained the basis for this change as follows:

Moreover, we stated in the proposal that minor or routine events that do not have a significant impact on the ability of a source to meet the standard need not be classified as a malfunction, addressed by the SSM plan, or included in periodic reports. We think there is no reason to classify an event as a malfunction if it does not cause, or have the potential to cause, the emission limitations in an applicable standard to be exceeded. A number of commenters requested that we make this policy clear in the regulatory language, rather than only in the preamble. These commenters suggested that the definition of malfunction could be revised to accomplish this. We think this is a good idea, and we have revised the definition accordingly. We think that this change will make it clear that events that do not cause, or have the potential to cause, emission limitations in an applicable standard to be exceeded need not be included either in the SSM plan or in periodic malfunction reports. [68 FR 32592-3, May 30, 2003]

As a result of this definition, recordkeeping and reporting is not required for upset events for the part 63 rules where it applies unless the event "causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded." Unfortunately, a few part 63 rules do not reference the general provisions definition of malfunction, but rather include the definition that was in place prior to the May 2003 amendments. To foster conformity and to "make it clear that events that do not cause, or have the potential to cause, emission limitations in an applicable standard to be exceeded need not be included either in the SSM plan or in periodic malfunction reports", we request those definitions be revised to conform with the current subpart A language.

In addition to the Consolidated Air Rule (see above) conforming revisions are needed for Subpart ZZZZ.

§63.6675 (Subpart ZZZZ, IC Engines) Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner **which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded.** Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

4. 40 CFR Part 63 Subpart UUU (Refining MACT 2)

The proposed revision to §63.1570(g) does not adequately remove the requirement to comply with the SSMP and further revision is suggested. EPA should revise §63.1570(g) as follows:

(g) Consistent with §§63.6(e) and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with §63.6(e). ~~**the SSMP. The SSMP must require that good air pollution control practices are used during those periods.**~~ The plan must also include elements designed to minimize the frequency of such periods (i.e., root cause analysis). The Administrator will determine whether deviations that occur during a period of startup, shutdown, or malfunction are violations, according to the provisions in §63.6(e) ~~**and the contents of the SSMP**~~.

We believe the word "require" in the second sentence could also be construed to impose a requirement to follow the plan. Since §63.6(e)(1) already contains the requirement to use good air pollution control practices and the revised first sentence imposes the requirement to comply with §63.6(e), the second sentence of paragraph (g) is redundant and we recommend deleting it.

Similarly, we believe the last sentence might be misread to mean that failure to follow the plan indicates failure to use good air pollution control practices. As EPA explained in the preamble to this proposal, sources should have the flexibility to implement the actions that make sense at the time of an event. Moreover, any violation would a violation of the general duty, not the emission limitation and not the "plan." Thus, we recommend deleting the last phrase "and the contents of the SSMP" and ending the sentence after "§63.6(e)."

5. Several subparts that indicate General Provisions applicability to a high level of detail do not address §63.6(e)(3)(ix).

On page 43993 of the proposal EPA states "....the plan itself does not become part of, and is not incorporated into, the source's title V permit." Paragraph §63.6(e)(3)(ix) is the regulatory language to accomplish that intent. However, §63.6(e)(3)(ix) was added to part 63 subpart A in the amendments of May 2003. Since many of the part 63 MACT standards predate that amendment, their tables of general provision applicability often do not address the new paragraph and thus it is not clear it applies in those cases. See, e.g., HON (Table 3 of subpart F). In addition, some later rules exhibit the same problem. For example, the MON (Table 12 of subpart FFFF), the Miscellaneous Coating Manufacturing MACT (Table 10 of subpart HHHHH), and the Refinery MACT (Table 44 of subpart UUU) rules list individual §63.6(e)(3) subparagraphs in their general provisions applicability tables and are silent on the applicability of (ix). As such, it may be argued that this paragraph, which is amended in this proposal to clarify that the plan itself is not part of the Title V permit, does not apply.

We therefore recommend the Agency incorporate (ix) into all of the tables where this paragraph is absent or otherwise clarify the paragraph's applicability.